

## General Comments

### OVERVIEW

This attachment contains a compilation of general comments and recommendations regarding Ecology's Public Review Draft Phase I Municipal Stormwater NPDES Permit (February 15, 2006). Additional changes are contained in a "tracked changes" document and other Attachments submitted by Seattle.

#### FORM OF STORMWATER MANAGEMENT PROGRAM:

(S5, generally) - For the record, Seattle prefers the SWMP approach used by Ecology in the 1995 MS4 NPDES permit, whereby each Permittee drafts a stormwater program that it has tailored to the needs of its jurisdiction, and Ecology evaluates and approves each SWMP. Seattle believes that this process, used frequently nationwide, is best suited to efficient and effective regulation of municipal stormwater management. Seattle has appreciated Ecology's skill in reviewing and helping Seattle to refine its management program to address the challenges of Seattle's ultra-urban environment over the past decade. However, Seattle recognizes that Ecology does not want to review each municipal SWMP and therefore is leaning toward a very prescriptive permit under which Ecology would not review individual SWMPs. Therefore, without waiving its objections, Seattle offers tracked changes and specific suggestions that would improve such a permit.

#### MEP/AKART CONSISTENCY:

(S4, S5.B, S5.C.5.B.ii, S5.C.7.b.i, S6.A, etc.) - Because the permit, as currently drafted, is prescriptive and designed by Ecology, Ecology should more clearly affirm that the SWMP, and the permit more generally as a whole, is MEP and AKART and that it meets all legal requirements for a stormwater program. Seattle's recommendation above for S5.B is based on the Fact Sheet (Page 27, lines 1-12), but the Fact Sheet is not enough. Without the explicit assurance in the permit that Permittees have fulfilled their obligations by following its terms, (1) Permittees and the public are left guessing as to whether the permit actually requires more, and (2) Ecology has sidestepped its permitting task. Without clarification, the permit requirements are improperly vague, overbroad and uncertain, and do not give Permittees adequate notice of the permit's requirements. Furthermore, under federal law, MEP applies to all permit conditions

#### FLEXIBILITY WITHIN S5, STORMWATER MANAGEMENT PROGRAM:

(S5) - Like all those involved in stormwater management, Seattle continues to struggle with the challenge of linking specific management decisions and actions to improvements in receiving water quality. For Seattle, this also relates to the best investment of the public dollar. As currently proposed, to comply with the S5 permit requirements, individually and cumulatively, would require significant degree of effort and resources. While the permit contains many elements that contribute to protection/improvement of water quality, we believe that it is unclear to the larger stormwater community which "combination" of specific actions and corresponding levels of effort are necessary to achieve satisfactory receiving water quality benefit. The appropriate combination of measures may become clearer during the permit's duration. As such, we feel that Ecology should include flexibility within the Permit, particularly S5, allowing adjustments during the permit term, if equivalent or better approaches are determined to produce better environmental return for the public investment. Suggested language:

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S5.B “During the coverage period of the permit, if the Permittee can demonstrate an equivalent or improved approach to any of the components listed within the SWMP, Ecology can modify the permit components, including Minimum Performance Measures, upon approval of a request by the Permittee. The Permittee shall be responsible for providing funding to cover the costs associated with review and approval by Ecology of Permittee’s proposed modifications. Permittee shall update its SWMP as necessary to include any changes caused by modifications made under this section.”

ECOLOGY DOES NOT REQUIRE VIOLATION OF LAW: (S5.A), page 4, add at line 38: Seattle suggests adding: “SWMP components and other permit terms do not require Permittees to violate or exceed the limits or authorizations set by any local, state, or federal law.” This is essential to clarify that Ecology is not requiring any actions that might violate or exceed legal limits. The sentence could be placed elsewhere, as it is intended to apply to the entire permit. As Ecology is aware, municipalities are creatures of state and local law and are subject to local (such as charters), state, and federal constitutional, statutory and other legal limitations, often imposed to protect the rights of individuals to promote the public good, civic order, and state policies. A well-known example is limits on inspections established in federal and state constitutions and by state courts in McCready and progeny. Surely it is not Ecology’s objective to place municipalities in jeopardy between permit compliance and violation of other binding law.

TMDLs: (S7), page 35, line 25 through page 36, line 14: Seattle suggests that this section be retitled “Total Maximum Daily Load Implementation” to better describe its purpose. Seattle understands that Permittees are bound to comply with NPDES permit requirements, not statements in TMDLs, which are planning tools. Seattle understands that Ecology’s intent is to incorporate actions and activities contained in Appendix 2 from TMDLs listed there, into the permit, for the Permittees and MS3s to which they apply. Seattle supports requiring BMPs in MS4 permits in order to implement TMDLs for municipal stormwater, which is consistent with federal guidance. For all other TMDLs that may be approved by EPA but are not in App. 2, Seattle understands that Ecology means the requirements of the permit to constitute all required action. For TMDLs approved after this permit is issued, Ecology reserves the right to initiate permit modification implement the TMDLs. See Seattle’s tracked changes and comments therein for suggestions. Please note that Seattle suggests striking the new definition for “applicable TMDL” and dealing with the concept at S7 instead.

CERTIFICATION OF ANNUAL REPORTS: (Add S9.D), page 45, line 6 et seq: Seattle suggests adding “Ecology shall review and certify in writing within 60 days of receipt that the report submitted by the Permittee satisfies the requirements of this permit.” Seattle believes certifying reports is part of Ecology’s responsibility as the regulatory agency overseeing the NPDES Permit program. It is also consistent with the Fact Sheet (Page 56-57) where Ecology states that the information contained in the Annual Reports will be used to evaluate compliance with permit requirements.

NON-COMPLIANCE NOTIFICATION: (G21), page 52: The section is new in this draft; it is inappropriate to a municipal stormwater permit, was not needed during the previous permit term, and should be entirely deleted. Such provisions arose in cut-and-dried NPDES discharge

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permits. In the context of a detailed programmatic permit, reporting “inability to comply” with any term becomes overly burdensome and punitive. The condition would force Permittees to speculate unreasonably or risk being second-guessed, and would take focus away from compliance. Discharges of which Permittee becomes aware that threaten health are very likely to be reported to local health authorities under existing laws. G3 and G15 (both with Seattle-suggested revisions) are more than sufficient.

| UPSET DEFENSE: (add as G22, page 52): Permittees are entitled to an upset defense, described in federal law, commonly granted, and important during this permit term considering the increasing role of complex, technology-based BMPs.

| GENERAL COMMENTS: In addition, below are general comments that emerged during Seattle’s review process, which are included in Seattle’s tracked changes version and emphasized here:

1. **Schedule** - As currently drafted, many permit requirements are associated with development and/or implementation schedules that do not reflect a reasonable timeframe for Seattle. Required municipal legal processes (e.g., legislative budget adoption, environmental review, new ordinance approval), public involvement and participation, and technical analysis are all examples of factors that affect schedule. Seattle’s proposed changes better reflect the work needed to develop and implement permit requirements.

### S5.C3 Coordination

Seattle recommends at least 24 months to meet the requirement for two reasons: 1) Most written agreements among Permittees will require Council/Executive approval before they can be legally implemented. It can take several months to meet minimum public notification, and, possibly SEPA requirements, and 2) Some water bodies are shared by many Permittees, which will add to the time necessary to negotiate the terms and reach agreement by all the parties.

### S5.C.5.b.v Controlling Runoff from New Development, Redevelopment and Construction Sites- schedule for legal authority

Throughout, 12 months is insufficient time to produce new ordinance and manuals through the required public process. City process for approving new ordinance requires at least 4-6 months from the time the ordinance is drafted and submitted to final approval; the 60 period after Ecology completes review for final public comment and City Council approval is insufficient time for public notice, SEPA, and GMA requirements to be met.

| S8 Monitoring QAPP, pages 36-44: Please see Seattle’s other comments, that indicate Ecology should approve QAPPs, and that the schedule for monitoring shall be extended based on when the QAPP is approved. In this way, the assumptions for monitoring can be firmly established between the regulator and the Permittee. This comment also promotes clarity.

2. **Coordination** - Seattle agrees with Ecology’s perspective that coordination on various permit elements can optimize stormwater programs by facilitating exchange of information,

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creating consistent protocols, leveraging public funds, and determining areas of research focus. However, coordination requirements in the permit need to: 1) be very clear as to what constitutes coordination, 2) ensure that a Permittee's ability to comply with the permit is not impacted by any other party's ability to meet coordination obligations, and 3) include a description of Ecology's role in coordination efforts.

3. **Clarification** - There are several areas within the proposed permit where clarity (e.g., definitions, better understanding of minimum requirements, etc.) would greatly improve our ability to comment. The majority of areas needing clarification are within S5 (Stormwater Management Program). Here are examples:

MS3s Draining to Combined Sewer (S3A), page 3, lines 17-19: Seattle suggests in tracked changes that this section be revised to read: "Each Permittee, Co-Permittee and Secondary Permittee is responsible for complying with the terms of this permit for the municipal separate storm sewers it owns or operates that discharge to the MS4." This clarifies that the permit does not cover MS3s discharging to the combined sewer, per 40 CFR § 122.26(a)(7). These flows are directed to a sewage treatment plant. This clarification to confirm the applicable area is important because Seattle is served variously by combined sewers, partially separated sewers, and separate storm drains.

S5.C.7.b.iii.1 Business Inspection –frequency

The draft permit states that the Permittee shall inspect "20% of these sites annually..." Does this mean that over a five-year period, 100% of sites are inspected or, can the Permittee inspect the volume of sites equal to 20% annually, but perhaps revisit some high priority sites and not visit other sites? Clarification would be useful on this requirement.

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